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IN THE

# Supreme Court of the United States

October Term, 1965

No. ~~1[illegible]~~ 1147

BALDWIN-HALL, INC.,

*Petitioner,*

v.

THE STATE OF NEW YORK,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

---

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above case in the Clerk's Office of the Court of Claims of the State of New York on December 22, 1965.

### Opinions Below

There was no opinion by the Court of Claims of the State of New York (R. p. 607). The opinion of the Appellate Division of the Supreme Court of the State of New York (R. pp. 616-617, App. pp. 1a-2a) is reported at 22 A. D. 2d 747, 253 N. Y. S. 2d 651. Two opinions were handed down by the Court of Appeals of the State of New York. A copy of

the first is contained in the Appendix at pp. 2a-4a. The final amended opinion is reported at 16 N. Y. 2d 1005, 265 N. Y. S. 2d 664, 212 N. E. 2d 899 and is printed in the Appendix at pp. 5a-7a.

## Jurisdiction

The judgment of the Court of Appeals of the State of New York was made and entered on December 22, 1965 and a copy thereof is printed in the Appendix at pp. 7a-8a. Thereafter a motion for reargument was denied by the Court of Appeals on February 17, 1966 and a copy of the order denying reargument is printed in the Appendix at p. 9a. A copy of an order granting petitioner's motion to amend the remittitur of the Court of Appeals appears in the Appendix at p. 10a and the judgment amending the remittitur appears in the Appendix at pp. 11a-12a.

## Questions Presented

In 1957 when the State of New York started reconstructing Oswego Boulevard in the City of Syracuse, petitioner was the owner of a five-story brick building and land which fronted at grade on the boulevard. After the work was completed, the grade of the boulevard had been lowered as much as 8½ feet, the boulevard had been changed into a limited access highway and petitioner no longer had direct access from any street in front of its property.

Petitioner filed a claim with the New York Court of Claims, basing its right of recovery on Section 99 of the Second Class Cities Law which provides that the grade of a street may not be changed except upon payment of damages done (App. p. 13a). The State has assumed the city's liability under Highway Law Section 30 (15) (App. p. 13a). Finding substantial loss to the value of the property caused

solely and directly by the change in grade and permitting no recovery for loss occasioned by the creation of a limited access highway, the Court of Claims allowed compensation in the amount of $57,000.

That judgment was reversed on appeal to the Appellate Division, Fourth Department, which, citing *Selig* v. *State of New York*, 10 N. Y. 2d 34, 217 N. Y. S. 2d 33, 176, N. E. 2d 59, a case decided after petitioner's property had been damaged, held petitioner was entitled to no recovery and all its loss was *damnum absque injuria*.

The New York Court of Appeals, by a 4-3 vote affirmed upon the memorandum of the Appellate Division, with this further comment:

> "The market value of claimant's property was probably diminished after and because of the public improvement which involved a change of grade of Oswego Boulevard on which street claimant's property fronted before any of the changes were made. However, as explained in *Selig* v. *State of New York*, (10 N. Y. 2d 34), such damages although in a sense resulting from a change of grade are not compensable when there has been no taking of any part of the subject property and no direct physical damage thereto from any change of grade of any street. In this instance the street on which the building formerly fronted was moved to a new location some distance away, and depressed, but the building still abutted at one side on another usable street. Such damage as claimant suffered was due to circuity of access and as held in *Selig* there is no provision in law for recovery thereof." (App. p. 5a).

Two dissenting opinions were written which illustrate how grossly erroneous were the analyses of the facts and the principles of law applied. (App. pp. 5a and 6a).

The holding in this case constitutes a repeal by judicial fiat of the change of grade statute and a tacit reversal of the fell established case law in New York which had heretofore permitted recovery under change of grade statutes for

precisely the kind of damages which were claimed by petitioner and allowed by the Court of Claims.

The questions presented here are:

1. Is it a violation of petitioner's right of due process protected by the Fourteenth Amendment to apply retroactively a new or grossly erroneous construction of state statute which overrules previous decisions and deprives petitioner, without compensation, of property rights which had become vested under pre-existing law?

2. Is the state, by refusing to allow compensation for substantial diminution in the value of petitioner's property, compelling it to pay more than its fair share of the cost of the highway improvement and thereby taking its property for a public use without compensation in violation of due process and in deprivation of equal protection of the laws guaranteed by the Fourteenth Amendment?

## Constitutional Provisions and Statutes Involved

The pertinent provisions of the change of grade statute, Section 99 of the Second Class Cities Law (Vol. 52, McKinney's Laws of New York, page 6) is set forth in the Appendix at p. 13a. The State's liability for damages recoverable under the change of grade statute is provided by Section 30(15) of the Highway Law (Vol. 24, McKinney's Laws of New York, page 56) is set forth in the Appendix at p. 13a.

The pertinent provisions of the Fifth and Fourteenth Amendments of the United States Constitution are set forth in the Appendix at pp. 13a and 14a, respectively. The relevant portions of Article I, Sections 6 and 7 of the New York Constitution are set forth in the Appendix at p. 14a.

## Statement

For the past 39 years, petitioner, a domestic corporation, has been engaged in the business of selling electrical supplies, fixtures and appliances at retail and wholesale in the City of Syracuse, New York, and nearby towns and villages (R. pp. 146, 153; App. pp. 26a and 27a). The property involved is located at Oswego Boulevard and the southwest corner of West Belden Avenue in Syracuse, New York and was owned and occupied by petitioner since 1947.

In 1957 the State of New York commenced construction on a Federal-aid highway project known as Oswego Boulevard-City of Syracuse Arterial. Prior to reconstruction, petitioner's property had a frontage of approximately 103 feet (R. p. 9, App. p. 15a) at grade on Oswego Boulevard (R. p. 10, App. p. 15a). After the work was completed, the grade of the boulevard had been changed and lowered (R. p. 10, App. pp. 15a-16a) from 4 feet at the north end of petitioner's property to 8½ feet at the south end and a retaining wall topped by a metal fence about 4 feet high had been constructed (R. p. 10, App. pp. 15a-16a) separating the front of the premises from the depressed pavement of the former boulevard which had become "Ramp C" (R. p. 10, App. pp. 15a-16a). No service road or any road was left at grade in front of the property (R. p. 23, App. p. 18a). Exhibits 11 and 48 illustrate the substantial change in the highway in relation to petitioner's property.

**Exhibit 11.**

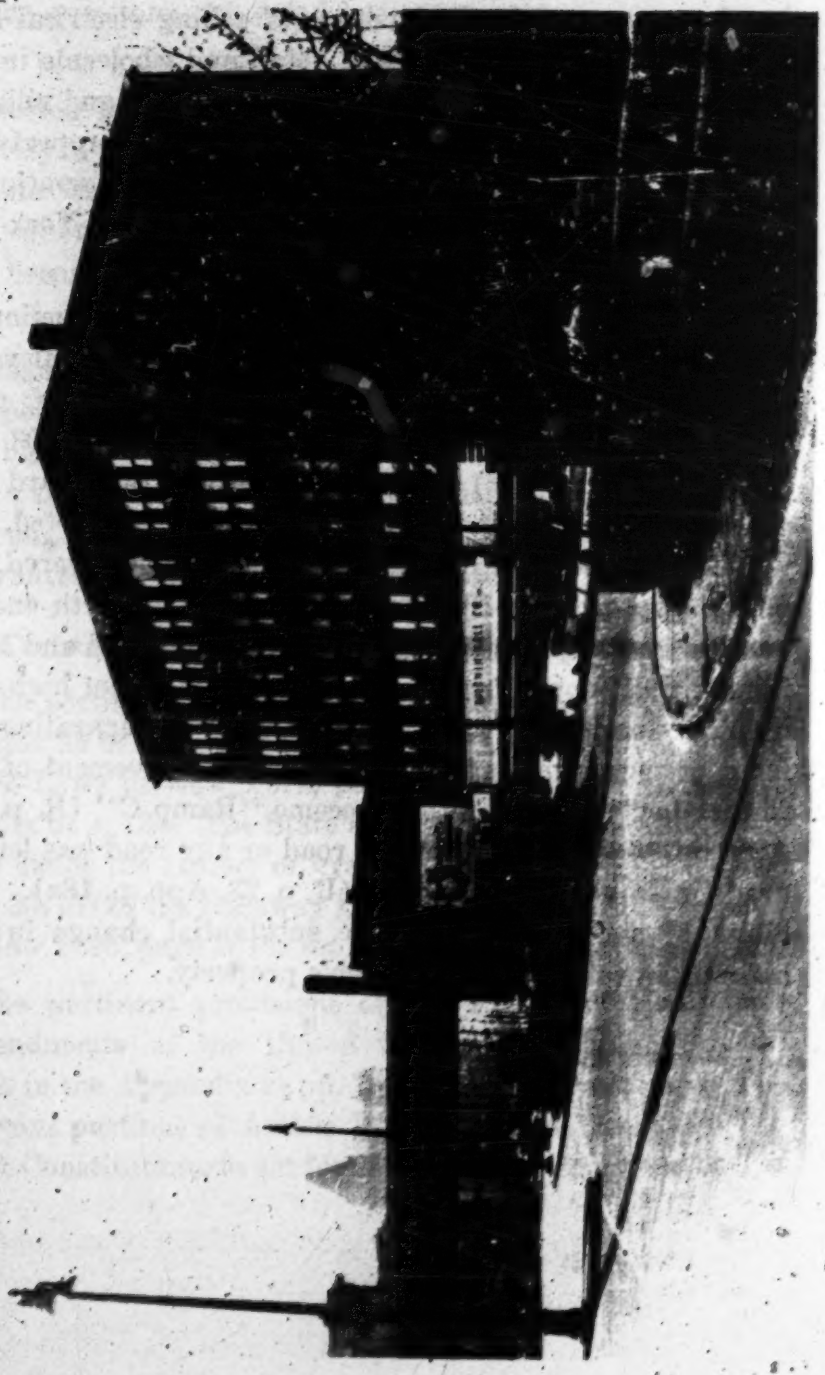
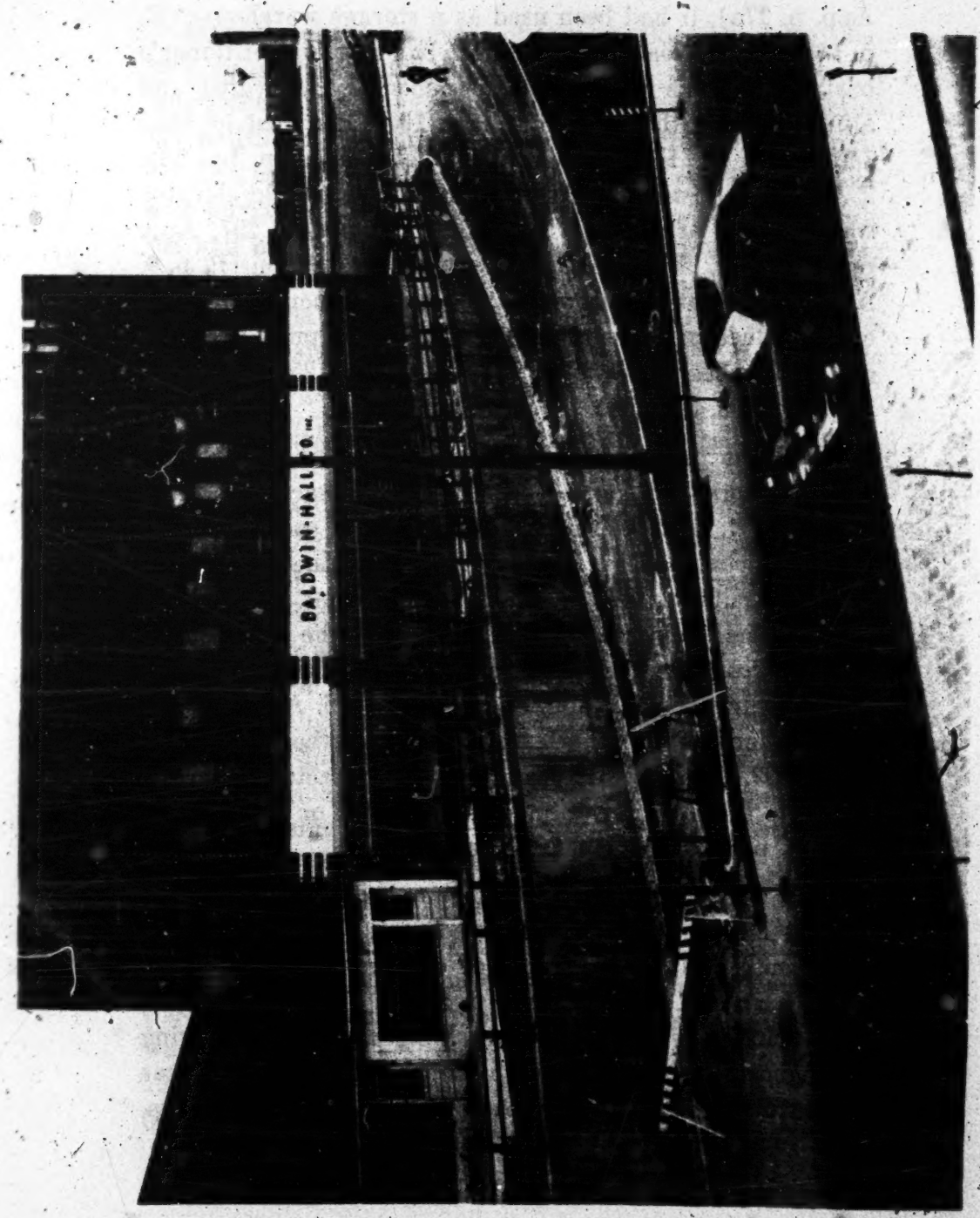


**Exhibit 48.**



When petitioner purchased the land and five-story brick building on April 30, 1946, for the sum of $45,000 (R. p. 12, App. p. 17a), it had been used as a storage warehouse (R. p. 143, App. p. 26a). To adapt the building for petitioner's business, it was substantially remodeled, renovated and altered during the years 1946 and 1947 at a cost of $44,732.79 (R. pp. 13-15, 142-143, 176-177, 296, App. pp. 18a, 25a-26a, 28a, 29a-30a). A few years later a freight elevator was installed at a cost of $12,059.90 (R. pp. 15, 297, App. pp. 18a, 30a). The building was in good condition (R. p. 9, App. p. 15a) and there was a substantial increase in real estate values in Syracuse between 1946, the purchase date, and 1957, when construction started (R. pp. 25-26, 390-391, App. pp. 19a, 34a-35a).

The front part of the building on the first floor facing Oswego Boulevard had been set up to transact "pick-up" business (R. p. 299, App. p. 31a). Retail customers and electrical contractors, employees of machine shops, job shops, manufacturers and various institutions such as hospitals and schools, were able to approach the front of the building from the grade of Oswego Boulevard and quickly pick up various small appliances (R. p. 146, App. p. 26a), small orders or emergency materials from the countermen (R. p. 299, App. pp. 31a-32a). Small contractors often returned to the store for counter service three or four times a day (R. p. 147, App. pp. 26a-27a).

In the rear part of the first floor, pre-ordered merchandise was assembled, packed and shipped across the loading dock either onto petitioner's trucks or onto vehicles of common carriers (R. pp. 152-153, App. p. 27a). The loading dock, used principally for receiving shipments and delivering merchandise in connection with the wholesale business, was located on the West Belden Avenue side (R. p. 299, App.

pp. 31a-32a) and deliveries were made by petitioner in all directions from its store (R. p. 153, App. p. 27a).

After the change in grade of Oswego Boulevard, petitioner's property became substantially less accessible than it was before (R. p. 24, App. p. 19a) and was no longer suitable for petitioner's business. Before reconstruction, the highest and best use of the property was for retail and wholesale purposes (R. pp. 10, 298, App. pp. 30a-31a). Its highest and best use after reconstruction was for warehousing with very limited retailing on the first floor (R. pp. 10, 413, App. pp. 15a-16a, 36a). Petitioner lost business and customers, causing it to look for another location to operate its business (R. p. 24, App. p. 19a).

On the trial, petitioner's experts placed the fair market value of the property before reconstruction of Oswego Boulevard at $196,050, and after at $48,500, for damages resulting from all factors in the sum of $147,460 (R. pp. 353-355, App. pp. 32a-34a). This testimony was based on what a willing buyer not under compulsion to buy and a willing seller not under compulsion to sell would consider in arriving at a fair value of the property both before and after the change of grade (R. p. 406, App. pp. 35a-36a). The State's own appraiser gave petitioner's structure a depreciated 1957 value of $151,761.60 (R. pp. 467-468, App. pp. 36a-37a), and using the before land value of State's real estate expert amounting to $21,600 (R. p. 520, App. p. 37a), the State's own testimony supports a before value of $173,361.

Yet when petitioner finally made a *bona fide* sale of the property after the reconstruction of Oswego Boulevard, the highest price it could obtain after the building and land was listed with several realtors (R. pp. 24-25, 242, App. pp. 19a, 29a) was $41,000, even though it would cost $195,523.20 at 1957 real estate values to reproduce the building

(R. p. 467, App. p. 36a), which then had a sound value of $151,761.60 (R. pp. 467-468, App. pp. 36a-37a).

Petitioner filed a claim with the New York Court of Claims for damage to the value of its property caused by the change in grade under Section 99 of the Second Class Cities Law which provides that the grade of a street may not be changed except "upon compensation for damages done" (App. p. 13a). It is undisputed that the State has assumed the city's liability under this statute by virtue of the provisions of Section 30(15) of the Highway Law (App. p. 13a).

After the initial proceedings were concluded and the Court of Claims had reserved decision, petitioner's attorneys moved for an order permitting petitioner to introduce additional proof on the question of damages (R. pp. 57, 59-62, App. pp. 21a, 22a-25a). The attorney's affidavit in support of the motion (R. pp. 59-62, App. pp. 22a-25a) shows that the motion was made because the ruling by the Court of Appeals in *Selig* v. *State of New York*, 10 N. Y. 2d 34, 217 N. Y. S. 2d 33 (1961), and the ruling of the Appellate Division in *National Biscuit Co.* v. *State of New York*, 12 A. D. 2d 998, 211 N. Y. S. 2d 435 (4th Dept. 1961), both of which were decided after closing of proof in this case. Both *Selig* and *National Biscuit Company* denied damages to the abutting owner despite change of grade statutes on the ground that there was no change of grade where a portion of the original highway adjacent to the property remained at grade as a service road. While petitioner's case was quite different because no portion of the original highway remained at grade, the Court in the *Selig* case, by way of dictum, had attempted to distinguish between change of grade damages and loss of access damages without defining the difference, thereby causing some confusion with respect to the factors which may be considered in determining the amount of damages recoverable in petitioner's claim.

Therefore, on the rehearing the factors considered in arriving at a damage figure were carefully limited to those directly attributable to the change in grade. The appraiser not only excluded circuity of access and diversion of traffic but loss of view and impairment of light and air as well (R. pp. 561-562, App. pp. 37a-38a). He testified that the before value of the property was the same or $196,050, but the after value, eliminating the factors mentioned, would be $65,000 (R. pp. 561-562, App. pp. 37a-38a).

The Trial Judge viewed the premises (R. p. 11, App. p. 16a). Instead of accepting either the figures of petitioner's or the State's witnesses, he found a before value of $122,000 (R. p. 11, App. p. 16a). However, he did accept the after value of $65,000 (R. p. 11, App. p. 16a) which excludes all non-compensable factors and awarded $57,000 damages directly resulting from the change of grade in front of petitioner's premises (R. p. 11, App. p. 16a).

Petitioner requested and the Court of Claims found, as conclusions of law, that petitioner's property had been taken in such manner as to require the payment of just compensation under the provisions of Sections 6 and 7 of Article I of the Constitution of the State of New York and the Fifth and Fourteenth Amendments of the Constitution of the United States and that a denial of petitioner's claim on the ground that under the authority of the *Selig* case, there was no change of grade would be contrary to law and constitute a violation of petitioner's rights protected by the foregoing constitutional provision (R. p. 33, App. p. 20a).

The State appealed on the single question whether petitioner sustained "any damages legally attributable to a change of grade as it passed in front of its property". The Appellate Division reversed the judgment insofar as it awarded damages (R. p. 615, App. p. 39a), holding on the authority of the *Selig* case that all petitioner's damages

were the result of loss of direct access to the new highway, diversion of traffic making vehicular access to the premises more circuitous from two directions, loss of view and air and that none of those factors gave rise to compensable damages under the change of grade statute. The Court concluded that the diminution in market value of the property is considered *damnum absque injuria* (App. p. 39a).

Petitioner thereupon appealed to the Court of Appeals which affirmed upon the memorandum of the Appellate Division with this further comment as stated in the second, revised opinion:

> "The market value of claimant's property was probably diminished after and because of the public improvement which involved a change of grade of Oswego Boulevard on which street claimant's property fronted before any of the changes were made. However, as explained in *Selig* v. *State of New York,* (10 N. Y. 2d 34), such damages although in a sense resulting from a change of grade are not compensable when there has been no taking of any part of the subjejct property and no direct physical damage thereto from any change of grade of any street. In this instance the street on which the building formerly fronted was moved to a new location some distance away, and depressed, but the building still abutted at one side on another usable street. Such damage as claimant suffered was due to circuity of access and as held in *Selig* there is no provision in law for recovery thereof." (App. p. 5a).

A motion for reargument was made to the Court of Appeals and denied. A motion to amend the remittitur was granted and the Court certified as follows:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the appellant under the Fifth and Fourteenth Amendments were violated. Appellant contends that by changing the grade of the street level abutting its business property the State effected a taking of its property and that the failure to compensate it therefor constituted

a denial of due process under the Fifth and Fourteenth Amendments. The Court of Appeals considered this contention and held that there was no denial of the appellant's constitutional rights." (App. p. 12a).

## Reasons for Granting the Writ

It would be difficult to find a case in which there was a more flagrant disregard of federally protected constitutional rights than in this one. Petitioner has been left helpless at the bar of justice in New York, stripped of its property rights by a grossly erroneous and retrospective application of the common law rule of *damnum absque injuria* — a rule characterized by the New York Court of Appeals, *Selig* v. *State of New York,* 10 N. Y. 2d 34, 217 N. Y. S. 2d 33, 176 N. E. 2d 59, as being against natural justice.

Whether the State Court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which petitioner is entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the State Court rests upon a fair or substantial basis. *Demorest* v. *City Bank Co.*, 321 U. S. 36, 42 (1944) as quoted from *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540 (1930).

The taking by a state of property rights for public use without compensation constitutes a deprivation of due process protected by the Fourteenth Amendment. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226 (1896); *Griggs* v. *Allegheny County,* 369 U. S. 84 (1962). The redress afforded petitioner under the change of grade statute is a right to recover damages caused directly by the change in grade and the right to enforce liability for such damages is in every sense a property right which is fixed at the time the property is damaged for a public use and

which cannot be defeated by subsequent legislation., *Ettor* v. *Tacoma*, 228 U. S. 148 (1913). A right settled by judicial construction is as much a part of the statute as the text itself and a change of decision is the same in its effect on vested rights as an amendment of the law by means of a legislative enactment. *Douglass* v. *Pike County*, 101 U. S. 677, 688 (1880). Petitioner's property right was secured to it under the cases which were the law of New York when the right vested and a change of ruling by the Court of Appeals cannot be applied retrospectively. *Muhlher* v. *Harlem R. R. Co.*, 197 U. S. 544 (1905); *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226 (1896).

Until the decision in this case, it was consistently held in New York that an abutting property owner may recover for consequential damages caused by a change in grade where a statute exists permitting such recovery although there was no actual physical taking of any part of the property and no physical damage was done and other access to and from the property remained. The only question was whether the change in grade resulted in a diminution of the value of the property. The following cases will illustrate that fact:

*Matter of Grade Crossing Commissioners*, 154 N. Y. 550, 49 N. E. 127 (1898). The property was at the intersection of Exchange and Michigan Streets in the City of Buffalo. The grade of Michigan Street was changed but access remained at the same grade via Exchange Street. The award was affirmed.

*Solkat Realty Corp.* v. *State of New York*, 172 Misc. 981, 16 N. Y. S. 2d 649 (Ct. Claims 1939), aff'd 262 App. Div. 944, 30 N. Y. S. 2d 702 (4th Dep't 1941), aff'd 288 N. Y. 547 (1942). Claimant's property abutted upon South Geddes Street in the City of Syracuse, the elevation of which was lowered by the State to eliminate a grade crossing. The State left claimant with an alternative means of access over West Fayette Street. Nevertheless, recovery was upheld.

*Mistretta* v. *State of New York*, 201 Misc. 946, 110 N. Y. S. 2d. 527 (Ct. Claims 1952), aff'd 280 App. Div. 960, 117 N. Y. S. 2d 666 (4th Dep't 1952). The property was on the southwest corner of South Work Street and Lester Avenue in the Village of Falconer. The grade of South Work Street was changed but claimant continued to have some access. The award was affirmed.

*Cook* v. *State of New York*, 176 Misc. 947, 29 N. Y. S. 2d 626 (Ct. Claims 1941), aff'd 267 App. Div. 847, 46 N. Y. S. 2d 15 (3d Dep't 1944). The property was on the southwest corner of Eldredge Street and Prospect Avenue and also abutted on State Street in the City of Binghamton. Street grade changes made claimant's premises less accessible on Prospect Avenue but improved vehicular travel on Eldredge Street. Access to State Street was unaffected. The award for damages resulting from change of grade was sustained.

*Knights* v. *State of New York*, 161 Misc. 552, 291 N. Y. Supp. 567 (Ct. Claims 1936), aff'd 251 App. Div. 781, 298 N. Y. Supp. 173 (4th Dep't 1937). One of the parcels in question was corner property on Main Street in the Village of Aurora. The grade of Main Street was changed but access to an intersecting street remained. Damages were upheld.

*Matter of Mayor*, 81 App. Div. 215, 80 N. Y. Supp. 732 (1st Dep't 1903). The property was located on Westchester and Trinity Avenues in New York City. While claimant continued to have the same access from Westchester, damages due to deprivation of the Trinity access because of a change of grade of Trinity Avenue were allowed.

The New York courts neither expressly overruled nor attempted to distinguish the prior cases. They simply ignored them on the authority of *Selig* where there was no change of grade, and, accordingly, there were no damages that were the direct result of a change in grade.

The unreversed finding of the Court of Claims is that there was a change of grade (R. p. 10, App. pp. 15a-16a).

There was not in this case a mere re-routing or diversion of traffic from the highway. The State did not and could not dispute that there was a substantial change in the highway in relation to petitioner's property. It did not even dispute that the value of petitioner's property had been seriously diminished by reason of the highway construction. Indeed, the first opinion of the Court of Appeals states: "The market value of claimant's property was in fact diminished after and because of the public improvement which involved a change of grade of Oswego Boulevard" (App. p. 2a) and the second, revised opinion states the same except there is substituted "probably" for "in fact" App. p. 5a).

The State's argument was that no part of the loss was legally attributable to the change in grade — that it was all caused by the creation of a limited access highway. And the New York appellate courts, in absolute disregard of the facts and the virtually unchallenged expert testimony in the record which excluded to the degree possible all loss of access damages, accepted that argument.

The only conceivable justification for such a holding would be a rule that where it is difficult to separate compensable from noncompensable items of damages, all recovery is precluded. But New York has always followed the rule that where, by the nature of the case, the damages cannot be estimated with certainty, the trier of fact may make the most intelligible and accurate estimate from all the facts and circumstances having any tendency to show damages, or their probably amount. *Drucher* v. *Manhattan Ry. Co.*, 106 N. Y. 157, 163, 12 N. E. 568 (1887); *Duane Jones Co.* v. *Burke*, 306 N. Y. 172, 192, 117 N. E. 2d 237 (1954). Again, the New York courts neither expressly overruled nor attempted to distinguish these cases.

It is clear that the State's errors were gross and obvious, coming close to the boundary of arbitrary action and warranting review by this Court. *Roberts* v. *City of New York*, 295 U. S. 264 (1935). A comparison of the difference between the first opinion of the Court of Appeals and its second one will quickly reveal that the Court had made up its mind that this was a *Selig* case and closed its eyes to the plain facts showing otherwise. The dissenting opinions (App. pp. 5a-7a) further point up petitioner's contention that the State's action is tantamount to a manipulation of State law in evasion of petitioner's federal constitutional rights. See *Demorest* v. *City Bank Co.*, 321, U. S., 36, 49 (1944), dissenting opinion by Mr. Justice Douglas. This Court represents the only remaining hope of correcting the wrong done to petitioner and of preventing future wrong to others who are similarly situated.

In addition to the foregoing, petitioner contends that even if its entire loss should be regarded as having been caused by the creation of a limited access highway, petitioner's property was nevertheless "taken for a public use" without compensation in violation of the due process clause of the Fourteenth Amendment. In *Martin* v. *Creasy*, 360 U. S. 219 (1959) the petitioners were before this Court prematurely for review of the question whether the state could destroy without compensation abutting landowner's right of access to an existing highway by designation of that highway as a limited access highway. The Court stated:

> "If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here." (360 U. S. at 225.)

Moreover, the denial of all compensation violates petitioner's right to equal protection of the laws guaranteed by the Fourteenth Amendment.

It practically goes without saying that providing a system of highways for the benefit of the general public is a proper State function. It follows that the expense of constructing, improving, maintaining and regulating State highways should be borne by the State and paid for from funds received from all the taxpayers of the State through presumtively duly apportioned taxes.

Yet petitioner, a resident taxpayer of New York State, has been compelled to bear, as well as its fair share of taxes, the additional hardship of the loss caused to its property by the State's plan to improve the public highway system.

While there is some justification for the doctrine of *damnum absque injuria* as it developed more than 100 years ago there is no reasonable or equitable basis for its application. In *Radcliff's Executors* v. *Mayor*, 4 N. Y. 195, 53 Am. D. 357 (1850), the Court pointed out at page 207:

> "The damage which they [abutting owners] sometimes sustain, because the level of the street does not correspond with the level of their land is usually more than compensated by the increased value which the property acquires from having a new front on a street. In some instances the land-owner will suffer a heavy loss; * * * but it is *damnum absque injuria*, and the owner must bear it. He often gets the benefit for nothing, when the value of his land is increased by opening or improving a street or highway; and he must bear the burden in the less common case of a depreciation in value in consequence of the work. It may be added, that when men buy and build in cities and villages, they usually take into consideration all those things which are likely to affect the value of their property, and particularly what will probably be done by way of opening and grading streets and avenues."

Thus, 100 years ago, when travel was limited, streets and highways were few and the automobile was unknown, any improvement in a street or highway rendering it safer or more convenient for travel usually resulted in an increase in

the market value of the abutting property, which more than offset any damage due to impairment or loss of access.

But the middle twentieth century brought a revolution wrought by motor vehicle transportation which demanded new and increasingly better highways for the benefit and safety of the general public. Who among today's property owners can foresee where, when and with what consequence he may become caught in the web-like development of the limited access highway?

The reason for the rule has disappeared with changing conditions. State highways benefit all the inhabitants of the State and, as with other public programs, all must bear their fair proportion of the cost. And where an abutting property owner, as a consequence of the improvement, sustains a loss greater than the benefit that accrues to him as a member of the general public, he should be compensated for the difference.

To apply a rule of law which denies any compensation to the abutting owners who have suffered real and substantial loss as a result of the State's highway plan is to select one particular class of persons for *a species of taxation* with no rational basis for such classification. As early as 1898 the United States Supreme Court enunciated the rule that charging a portion of the expense of a street improvement against an abutting owner in excess of any special or peculiar benefits accruing to him results in a taking of property for public use without compensation (*Norwood* v. *Baker*, 172 U. S. 269 [1898]). The Court stated at page 279:

> " * * * [T]he exaction from the owner of private property of the cost of public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation." (Emphasis that of the Court.)

And at page 292:

> "The present case is one of illegal assessment under a *rule or system* which, as we have stated, violated the constitution in that the entire cost of the street improvement was imposed upon the abutting property * * * without any reference to special benefits." (Emphasis that of the Court.)

In *Nashville, Chatanooga & St. Louis Ry.* v. *Walters*, 294 U. S. 405 (1935), it was held unreasonable and arbitrary to burden a railroad with one-half the cost of building an underpass which was part of a Federal-aid highway system when the only contribution by the owners of motor vehicles who would use the highway was in the form of the general taxes paid by them. Justice Brandeis, speaking for the majority, stated at page 429:

> "It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. * * * But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."

The rule was recently reaffirmed in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Public Utilities Commission of California*, 346 U. S. 346 (1953), where the Court stated at page 352:

> "There is the proper limitation that such allocation of costs must be fair and reasonable."

It was shown in this case that the construction involved a Federal-aid highway project (49) benefiting the general public. It cannot be denied that petitioner made its fair contribution in taxes toward the improvement. Nor can it be denied that the State is compelling petitioner, under a rule of law, namely, the doctrine of *damnum absque injuria*, to make an additional, unreasonable and arbitrary contribution of at least $57,000. This amounts to a taking of

private property for public use and constitutes a denial of equal protection of the laws in violation of Article I, Sections 6 and 11 of the New York Constitution and of the Fifth and Fourteenth Amendments to the United States Constitution.

## CONCLUSION

**For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.**

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IN THE

# Supreme Court of the United States

October Term, 1965

No. 147

BALDWIN-HALL, INC.,

*Petitioner,*

v.

THE STATE OF NEW YORK,

*Respondent.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

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# APPENDIX

## DECISION OF APPELLATE DIVISION.

MEMORANDUM:

Judgment insofar as it awards damages to claimant unanimously reversed on the law and facts and claim dismissed and otherwise judgment affirmed, without costs of these appeals to either party. Certain findings of fact and conclusions of law disapproved and reversed and new conclusions made. Memorandum: The State appeals from that portion of the judgment which makes an award to claimant in the sum of $57,000 plus interest as damages for diminution in value of claimant's property caused by the change of grade of Oswego Boulevard in front of claimant's premises for the purpose of construction of an arterial highway. No part of claimant's property was appropriated. The damages claimed by claimant were the result of loss of direct access to the new highway, diversion of traffic making vehicular access to the premises more circuitous from two directions, loss of view by boulevard users and impairment of light and air, none of which give rise to compensable damages under the change of grade statute. (See Second Class Cities Law, § 99.) In *Selig* v. *State of New York*, (10 N. Y. 2d 34) the court said at page 39: "It has long been the rule in this State that consequential damages may not be recovered by an abutting property owner for the diminution in value of his property because the State, in changing the course of a adjoining highway, interferes with the access to his land or diverts traffic therefrom. Damages resulting merely from circuity of access are considered as *damnum absque injuria*". (See, also, *Nettleton Co.* v. *State of New York*, 11 A. D. 2d 899; *Hall & McChesney* v. *State of New York*, 15 Misc. 2d 748, affd. 11 A. D. 2d 899, mot. for lv. to app. den. 8 N. Y. 2d 710; *National Biscuit Co.* v. *State of New York*, 12 A. D. 2d 998, mod. 14 A. D. 2d 729, affd. 11 N. Y. 2d 743, cert. den. 370 U. S. 924.) We conclude that the

diminution in value of claimant's property is considered as *damnum absque injuria*. Accordingly, the judgment awarding damages should be reversed and the claim dismissed; in all other respects the judgment should be affirmed.

---

## FIRST, UNREVISED DECISION OF COURT OF APPEALS.

MEMORANDUM:

The order should be affirmed, without costs, on the memorandum at the Appellate Division. We make this further comment: the market value of claimant's property was in fact diminished after and because of the public improvement which involved a change of grade of Oswego Boulevard on which street claimant's property fronted before the changes were made. However, as explained in *Selig* v. *State of New York*, (10 N. Y. 2d 34), such damages although in a sense resulting from a change of grade are not compensable when there has been no taking of any part of the subject property, no direct physical damage thereto from the change of grade, and no change in grade of any street or part thereof actually abutting on the property. Such damage as claimant suffered was due to an impairment of access and as held in *Selig* there is no provision in law for the recovery thereof.

BERGAN, J. (dissenting)

Resolution of the legal problem in this case seems possible on the line of a simple form of syllogism: The statute requires compensation for damage done by a change of grade of a street; the unreversed finding of the Court of Claims is that the street grade was changed; there is some uncontradicted proof of damage to claimant attributed solely to the change in street grade.

*First, Unrevised Decision of Court of Appeals.*

It is conceded by the State that the statute (Second Class Cities Law, § 99) applicable to this Syracuse street requires "compensation for damages done" in changing the "grade of a street" and this section must be read with Highway Law, § 30 (15). (*Mirro* v. *State of New York*, 260 App. Div. 525, affd. 285 N. Y. 678.)

A number of factual findings that there had been a change in street grade were made by the Court of Claims. These findings were not reversed, or even referred to, by the Appellate Division's order which was expressly addressed to the finding of damages sustained by claimant from the change of grade. The Appellate Division's memorandum indicated the court believed no such damage had been established.

But there is opinion evidence in the record that, eliminating all other elements which the Appellate Division held inapplicable, and on the basis of a change of grade alone, claimants had been damaged. This evidence, which is not factually disputed could not be entirely disregarded by the Appellate Division as though it were not in the record.

The decision in *Selig* v. *State of New York*, (10 N. Y. 2d 34) did not hold, and could not in view of the statute have held, that if there were a change of grade and resulting damage, there could not be a recovery. It held, rather, there were no damages established by virtue of a change in grade. That is not this case and the statute mandates "compensation for damages done" by a change in grade. The order should be reversed and the judgment of the Court of Claims reinstated.

VAN VOORHIS, J. (dissenting):

I concur in Judge Bergan's dissenting opinion and agree that the order appealed from should be reversed and the

judgment of the Court of Claims reinstated. All vehicular accession to one street upon which claimant's building fronted is eliminated by change of grade. In *Buro* v. *State*, 306 N. Y., 730, affirming 281 App. Div. 61, and *Selig* v. *State*, 10 N. Y. 2d 34, recovery was denied for the reason that accession to the affected street was not destroyed, but was rendered less valuable due to the raising or depression of the center of the street, or the routing of traffic. In cases as *Red Apple Rest.* v. *McMorran*, 12 N. Y. 2d 203, accession into large parking areas abutting the street was channeled by guard rails, in the interest of public safety, and damages were disallowed for the reason that "The guard rails, as erected, did not create a nonaccess highway or bar access to the premises in question but left ample room for ingress and egress." Access to one street is being entirely prevented, by this change of grade, to one street on which the property runs, without compensation, for the reason that the property can still be reached by another street at the rear. This, in my judgment, goes beyond anything that has been held in any previous case.

* * * * *

Order affirmed, without costs, in a memorandum. No opinion. All concur except Van Voorhis and Bergan, JJ., who dissent in separate opinions in each of which the other concurs and in both of which Scileppi J. concurs.

## FINAL, REVISED DECISION OF COURT OF APPEALS.

The order should be affirmed, without costs, on the memorandum at the Appellate Division. We make this further comment: the market value of claimant's property was probably diminished after and because of the public improvement which involved a change of grade of Oswego Boulevard on which street claimant's property fronted before any of the changes were made. However, as explained in *Selig* v. *State of New York*, (10 N. Y. 2d 34), such damages although in a sense resulting from a change of grade are not compensable when there has been no taking of any part of the subject property and no direct physical damage thereto from any change of grade of any street. In this instance the street on which the building formerly fronted was moved to a new location some distance away, and depressed, but the building still abutted at one side on another usable street. Such damage as claimant suffered was due to circuity of access and as held in *Selig* there is no provision in law for recovery thereof.

BERGAN, J. (dissenting). Resolution of the legal problem in this case seems possible on the line of a simple form of syllogism: the statute requires compensation for damage done by a change of grade of a street; the unreversed finding of the Court of Claims is that the street grade was changed; there is some uncontradicted proof of damage to claimant attributed solely to the change in street grade.

It is conceded by the State that the statute (Second Class Cities Law, § 99) applicable to this Syracuse street requires "compensation for damages done" in changing the "grade of a street" and this section must be read with subdivision 15 of section 30 of the Highway Law. (*Mirro* v. *State of New York*, 260 App. Div. 525, affd. 285 N. Y. 678.)

A number of factual findings that there had been a change in street grade were made by the Court of Claims. These findings were not reversed, or even referred to, by the Appellate Divion's order which was expressly addressed to the finding of damages sustained by claimant from the change of grade. The Appellate Division's memorandum indicated the court believed no such damage had been established.

But there is opinion evidence in the record that, eliminating all other elements which the Appellate Division held inapplicable, and on the basis of a change of grade alone, claimants had been damaged. This evidence, which is not factually disputed, could not be entirely disregarded by the Appellate Division as though it were not in the record.

The decision in *Selig* v. *State of New York,* (10 N. Y. 2d 34) did not hold, and could not in view of the statute have held, that, if there were a change of grade and resulting damage, there could not be a recovery. It held, rather, there were no damages established by virtue of a change in grade. That is not this case and the statute mandates "compensation for damages done" by a change in grade. The order should be reversed and the judgment of the Court of Claims reinstated.

VAN VOORHIS, J. (dissenting). I concur in Judge BERGAN's dissenting opinion and agree that the order appealed from should be reversed and the judgment of the Court of Claims reinstated. All vehicular accession to one street upon which claimant's building fronted is eliminated by change of grade. In *Buro* v. *State of New York,* (306 N. Y. 730, affg. 281 App. Div. 61) and *Selig* v. *State of New York,* (10 N. Y. 2d 34) recovery was denied for the reason that accession to the affected street was not destroyed, but was rendered less valuable due to the raising or depression of the center of the street, or the routing of traffic. In cases such as *Red Apple Rest* v.

*McMorran*, (12 N. Y. 2d 203), accession into large parking areas abutting the street was channeled by guardrails, in the interest of public safety, and damages were disallowed for the reason that "The guardrails, as erected, did not create a nonaccess highway or bar access to the premises in question but left ample room for ingress and egress." Access to one street is being entirely prevented, by this change of grade, to one street on which the property runs, without compensation, for the reason that the property can still be reached by another street at the rear. This, in my judgment, goes beyond anything that has been held in any previous case.

Chief Judge DESMOND and Judges DYE, FULD and BURKE concur in MEMORANDUM; Judges VAN VOORHIS and BERGAN dissent in separate opinions in each of which the other concurs and in both of which Judge SCILEPPI concurs.

Order affirmed, without costs, in a memorandum.

---

## JUDGMENT ON DECISION OF NEW YORK STATE COURT OF APPEALS.

The above-named claimant-appellant having appealed to the Court of Appeals from an Order of the Appellate Division of the Supreme Court, Fourth Judicial Department, entered in the Clerk's Office of the Court of Claims on October 29, 1964, reversing the judgment of the Court of Claims entered in the Clerk's Office thereof on July 12, 1963, and dismissing claim; and judgment in accordance with the said order of the Appellate Division having been entered in the Clerk's Office of the Court of Claims on October 30, 1964, reversing judgment insofar as it awards damages of claim, and dismissing claim, without costs to either party; and said appeal having been argued by Vincent A. O'Neil, of Counsel

*Judgment on Decision of New York State Court of Appeals.*

for the Appellant, and by Honorable Louis J. Lefkowitz, Attorney General, by Jean M. Coon, of counsel, for the respondent, The State of New York, and after due deliberation the Court of Appeals having handed down its decision on November 24, 1965, affirming the order appealed from, without costs, all concurring except Van Voorhis and Bergan, J. J., who dissent in separate opinions in each of which the other concurs and in both of which Scileppi, J., concurs, and an Order having been entered in the Court of Appeals on November 24, 1965, in accordance with the said decision;

AND the original record on appeal together with a certified copy of the Order of the Court of Appeals entered in the Clerk's Office thereof on November 24, 1965, having been filed in the Clerk's Office of the Court of Claims on December 6, 1965, it is

ORDERED AND ADJUDGED, That the Order of the Appellate Division of the Supreme Court, Fourth Judicial Department, entered in the Clerk's Office of the Court of Claims on the 29th day of October 1964, reversing the judgment of the Court of Claims entered in the Clerk's Office thereof on July 12, 1963, and dismissing the claim, without costs to either party, be and the same is affirmed, without costs.

Dated: Albany, New York
December 22, 1965

ROBERT T. CROSS
Deputy Clerk of the Court of Claims

## ORDER DENYING REARGUMENT.

STATE OF NEW YORK — IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the Seventeenth day of February, A. D. 1966.

Present: HON. CHARLES S. DESMOND,
Chief Judge, presiding.

---

4 Mo. No. 208

Baldwin-Hall Co., Inc.,
*Appellant,*

— *vs.* —

The State of New York,
*Respondent.*

---

A motion for reargument of the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

(SEAL)

A copy
RAYMOND J. CANNON
Clerk

## ORDER GRANTING AMENDMENT OF REMITTITUR.

STATE OF NEW YORK — IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-fourth day of March, A. D. 1966.

Present: HON. CHARLES S. DESMOND,
Chief Judge, presiding

---

Mo. No. 269
Baldwin-Hall, Co., Inc.,
*Appellant*,
— *vs.* —
The State of New York,
*Respondent*.

---

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the appellant under the Fifth and Fourteenth Amendments were violated. Appellant contends that by changing the grade of street level abutting its business property the State effected a taking of its property and that the failure to compensate it therefor constituted a denial of due process under the Fifth and Fourteenth Amendments. The Court of Appeals considered this contention and held that there was no denial of the appellant's constitutional rights.

AND the Court of Claims hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

(SEAL)

A copy
GEARON KIMBALL
Deputy Clerk

---

## JUDGMENT AMENDING REMITTITUR.

The above-named claimant-appellant having appealed to the Court of Appeals from an Order of the Appellate Division of the Supreme Court, Fourth Judicial Department, entered in the Clerk's Office of the Court of Claims on October 29, 1964, reversing the judgment of the Court of Claims entered in the Clerk's Office thereof on July 12, 1963, and dismissing claim; and judgment in accordance with the said order of the Appellate Division having been entered in the Clerk's Office of the Court of Claims on October 30, 1964, reversing judgment insofar as it awards damages of claim, and dismissing claim, without costs to either party; and said appeal having been argued by Vincent A. O'Neil, of counsel for the appellant, and by Honorable Louis J. Lefkowitz, Attorney General, by Jean M. Coon, of counsel, for the respondent, The State of New York, and after due deliberation the Court of Appeals having handed down its decision on November 24, 1965, affirming the order appealed from, without costs, all concurring except Van Voorhis and Bergan, JJ., who dissent in separate opinions in each of which the other concurs and in both of which Scileppi, J., concurs, and an Order having been entered in the Court of Appeals on November 24, 1965, in accordance with the said decision;

AND the original record on appeal together with a certified copy of the Order of the Court of Appeals entered in the Clerk's Office thereof on November 24, 1965, having been filed in the Clerk's Office of the Court of Claims on December 6, 1965, and Judgment in accordance therewith having been entered in the Clerk's Office of the Court of Claims on December 22, 1965;

AND a motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon to the Court of Appeals and due deliberation having been there-

upon had, and an Order having been entered in the Clerk's Office of the Court of Appeals on March 24, 1966, granting the said motion, requesting the return of the remittitur and amending same by adding thereto in accordance with the decision of the Court of Appeals handed down on March 24, 1966, it is

ORDERED AND ADJUDGED that the remittitur of the Court of Appeals be and the same hereby is amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the appellant under the Fifth and Fourteenth Amendments were violated. Appellant contends that by changing the grade of street level abutting its business property the State effected a taking of its property and that the failure to compensate it therefor constituted a denial of due process under the Fifth and Fourteenth Amendments. The Court of Appeals considered this contention and held that there was no denial of the appellant's constitutional rights."

and it is further

ORDERED AND ADJUDGED, That the Order of the Appellate Division of the Supreme Court, Fourth Judicial Department, entered in the Clerk's Office of the Court of Claims on the 29th day of October, 1964, reversing the judgment of the Court of Claims entered in the Clerk's Office thereof on July 12, 1963, and dismissing the claim, without costs to either party, be and the same hereby is affirmed, without costs.

Dated: Albany, New York
April 4, 1966

ROBERT T. CROSS
Deputy Clerk of the Court of Claims

## SECTION 99, SECOND CLASS CITIES LAW OF STATE OF NEW YORK.

"The grade of any street shall not be fixed or established except by direction of the common council. The grade of a street heretofore or hereafter legally established shall not be changed, except by direction of the common council, and except also upon compensation for damages done, to be ascertained in and by the proceedings provided by law for ascertaining damages for lands taken for the opening of streets. * * * ."

---

## SECTION 30 (15), HIGHWAY LAW OF STATE OF NEW YORK.

"If the work of constructing, reconstructing or improving such state highways and bridges causes damage to property not acquired as above provided, the state shall be liable therefor, but this provision shall not be deemed to create any liability not already existing by statute. * * * "

---

## AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES (Excerpt).

"No person shall be * * * deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

---

## AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES, SECTION 1 (Excerpt).

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

---

## ARTICLE 1, SECTION 6 OF THE CONSTITUTION OF THE STATE OF NEW YORK (Excerpt).

"No person shall be deprived of life, liberty or property without due process of law."

---

## ARTICLE 1, SECTION 7 OF THE CONSTITUTION OF THE STATE OF NEW YORK (Excerpt).

"(a) Private property shall not be taken for public use without just compensation."

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# EXCERPTS FROM RECORD ON APPEAL.

(P. 7)

## DECISION.

* * * * *

(P. 9)

9. At the time of the reconstruction of Oswego Boulevard, claimant's property had a frontage of 103.38 feet on Oswego Boulevard, 83.93 feet on West Belden Avenue, and measured 46.67 feet long along the north boundary and 108.35 feet along its west boundary.

10. The land was improved by a five story brick building built over 65 years ago, and is still in good condition as shown on photographs thereof received in evidence.

* * * * *

(P. 10)

12. Prior to the reconstruction of Oswego Boulevard and surrounding area, the claimant's property was at grade with Oswego Boulevard.

13. After the reconstruction, the grade of the street in front of the claimant's property was changed and lowered.

14. The branch of Oswego Boulevard which formerly existed in front of the claimant's property is now called "Ramp C" and is 14 feet wide at its narrowest point.

15. As a result of the change of grade of Oswego Boulevard in front of the claimant's property and the construction of "Ramp C", the State constructed a concrete wall along the westerly side of "Ramp C" about four (4) feet high at the north end and increasing to about 8½ feet above the pavement of the reconstructed North Salina Street at the south end or line of claimant's premises.

16. A four-rung metal fence about four (4) feet in height was constructed on the top of the wall by the State.

*Decision.*

17. The highest and best use of claimant's property prior to the reconstruction was for general retail and wholesale purposes; after the reconstruction for warehousing with very limited retailing on the first floor.

* * * * *

(P. 11)

19. The fair and reasonable market value of the claimant's property prior to the commencement of the reconstruction and lowering of the grade in front thereof was $122,000.00.

20. The fair and reasonable market value of claimant's property after the reconstruction and lowering of the grade in front thereof was $65,000.00.

21. As a direct result of the change of grade in front of claimant's premises, the claimant was damaged in the sum of $57,000.00, and is entitled to an award in that amount with interest thereon from March 18, 1957.

22. The Court viewed the premises.

* * * * *

---

(P. 12)

CLAIMANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

* * * * *

5. The property which is the subject of this claim was acquired by claimant on April 30, 1946 for the sum of $45,000.00 (Exhibit 3; Vol. I, 121). Found P. C. R.

* * * * *

(P. 13)

11. After claimant purchased the property in 1946, claimant undertook extensive remodeling, renovations and alterations with respect to the building (Vol. I, 122-125). Found. P. C. R.

12. The remodeling, renovations and alterations done by claimant in the years 1946 and 1947 consisted of the

(P. 14)

following: the five separate entrances to the building on Oswego Boulevard were removed and the front entrance was remodeled so as to be suitable for retail purposes; the basement and first floors of the building were supported with beams and reinforced with concrete and steel sections of new floorings; previously the building had no central heating; a boiler room was installed in the basement to accommodate a steam heating system with a Cyclotherm oil burning boiler; vectors, unit heaters, piping and electrical controls were installed throughout; the building had inadequate toilet facilities and new plumbing and toilet fixtures were installed throughout; claimant installed all new electrical wiring and electrical fixtures in the building including 50 fluorescent fixtures in the office, 10 to 15 fluorescent fixtures to display retail wares and fluorescent fixtures throughout the shipping area; the main floor was

completely remodeled and divided into three sections — retail store, sales offices with plaster walls and shipping area; an acoustical ceiling and tile floor was installed; the second floor was completely remodeled by setting up three private offices, a conference room and one large general office, all with acoustical ceilings and tile floors and this second floor became claimant's general offices; the third, fourth and fifth floors were rewired and renovated; the stairway between the first and second floor was remodeled; a new roof with flashings was installed; downspouts were repaired; sewer and water connections were renovated; windows were repaired; the existing loading dock on West Belden Avenue was extended ten feet and a pit leading to the basement with a conveyor belt was con-
(P. 15)
structed (Vol. I, 122-125, 178, 179, 188, 189; Vol. II, 80-84, 138, 153-156). Found. P. C. R.

13. The cost of the remodeling, rebuilding and renovation work totalled $44,732.79, exeluding the cost of an elevator that was installed at a later date (Vol. II, 84). Found. P. C. R.

* * * * *

15. Two years after claimant moved in the building a new semi-automatic freight elevator with a penthouse for the controls on the roof was installed at a cost of $12,059.90 (Vol. I, 180; Vol. II, 84). Found P. C. R.

* * * * *

(P. 23)

63. After the change of grade of Oswego Boulevard (Ramp "C") there was no service road or any road left at grade in front of claimant's property (Exhibits 6, 8, 16). Found. P.C. R.

* * * * *

*Claimant's Proposed Findings of Fact and Conclusions of Law.*

(P. 24)

67. Claimant's property because of the change of grade of Oswego Boulevard, is substantially less accessible than it was before (Vol. I, 131-133; Vol. II, 68, 69, 103, 163, 189) (Compare Exhibits 5 and 6; 7 and 8; 9 and 10; 11 and 12; 13 and 14; 15 and 16). Found. P. C. R.

68. As the result of the change of grade of Oswego Boulevard, Claimant lost business and customers, causing claimant to look for another location to operate its business (Vol. II, 19-21.) Found. P. C. R.

69. By deed dated June 29, 1959 recorded in the Onondaga County Clerk's Office in Book of Deeds 1956, page 294, on the 29th day of June, 1959, claimant sold the premises described in deeds marked Exhibits 3 and 4 to a corporation known as Middle Oaks, Inc. (Exhibit 61; Vol. I, 189, 239, 240). Found. P. C. R.

70. This was an arm's length transaction in the ordinary course of business (Vol. I, 190, 191, 201, 202, 203). Refused except as found. P. C. R.

71. The consideration for the sale to Middle Oaks, Inc. was $41,000.00, part paid in cash and part by the assump-
(P. 25)
tion of an existing $25,000.00 mortgage (Vol. I, 254). Found. P.C. R.

* * * * *

77. Real Estate values in general increased substantially in the City of Syracuse between 1946 when claimant purchased the property, and 1957, when the change of
(P. 26)
grade of Oswego Boulevard was commenced (Vol. II, 215, 216). Found. P. C. R.

* * * * *

(P. 31)

CLAIMANT'S ADDITIONAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

* * * * *

(P. 33)

IX. A denial of the claimant's claim on the ground that under the authority of *Selig v. The State*, 10 N. Y. 2, 34 that there was no change of grade would be contrary to law and would deprive claimant of its property without due process of law and would take claimant's private property for public use without just compensation, in violation of Sections 6 and 7 of Article I of the Constitution of the State of New York and the Fifth and Fourteenth Amendments to the Constitution of the United States. Found. P. C. R.

X. Claimant's property has been taken in such a manner as to require the payment of just compensation under the provisions of Sections 6 and 7 of Article I of the Constitution of the State of New York and the Fifth and Fourteenth Amendments of the Constitution of the United States. Found. P. C. R.

(P. 57)

ORDER PERMITTING CLAIMANT TO INTRODUCE ADDITIONAL PROOF.

(SAME TITLE).

A motion having been made by the claimant for an order permitting claimant to introduce additional proof on the question of damages, and said motion having come on before the undersigned, Hon. Charles T. Major, Judge of the Court of Claims, at the State Office Building, Syracuse, New York, on the 20th day of July, 1961, said motion having been adjourned by consent from June 20th, 1961, and claimant having appeared by Costello, Cooney & Fearon, attorneys, by George R. Fearon, Esq., and the State of New York having appeared by Hon. Louis J. Lefkowitz, Attorney General, by Stanley V. Scott, Esq., Deputy Attorney General, and after hearing Mr. Fearon in favor of said motion and Mr. Scott in opposition thereto, and upon reading and filing the Notice of Motion and affidavit of George R. Fearon, Esq. sworn to the 7th day of June, 1961, and due deliberation having been had, it is

ORDERED that said motion be and the same is hereby granted and claimant is permitted to introduce additional proof on the question of damages upon a date to be hereafter fixed by the Court.

Dated, Syracuse, July 31, 1961.

CHARLES T. MAJOR,
*Judge, Court of Claims*

(P. 59

AFFIDAVIT IN SUPPORT OF MOTION SWORN TO JUNE 7, 1961.

(SAME TITLE).

State of New York
County of Onondaga } ss.:

GEORGE R. FEARON, being duly sworn deposes and says:

He is an attorney at law and a member of the firm of Costello, Cooney & Fearon, the attorneys for claimant.

Deponent was counsel for claimant on the trial of this action held in Syracuse, New York before Honorable Charles T. Major on October 6th, 7th, 10th and 11th; November 28th and 29th; and December 1st, 1960.

At the conclusion of the trial, Judge Major reserved decision in the case and gave counsel for claimant and the State the opportunity to submit proopsed findings of fact and conclusions of law; the minutes were typed and on or about May 16, 1961 the Attorney General served the Court and claimant with a copy of its proposed findings of fact; to date claimant's proposed findings have not been submitted to the Court and a decision has not as yet been rendered.

The within claim is for damages resulting from change of grade pursuant to section 99 of the Second Class Cities Law. At the time the case was tried the question of the ilability of the State for all damages arising out of the change of grade of Oswego Boulevard in the City of Syracuse had been established in the case of *National Biscuit Company v. State,* 24 M. 2d 106. Deponent predicated its

(P. 62)

him that they have made a re-appraisal and will be able to break down and clarify the basis of their previous testimony, if given the opportunity by the Court. It is sub-

*Affidavit in Support of Motion sworn to June 7, 1961.*

(P. 60)

method of proof upon the proposition that all consequential damages resulting from a change of grade in the City of Syracuse are compensable. (See Vol. 5, Nichols on Eminent Domain, pp. 25-28.) However, subsequent to the closing of proof in the case at bar on February 23, 1961, the decision of *National Biscuit Company v. State* was reversed in 12 A. D. 2d 998. In the decision of reversal, the Appellate Division ruled that the Court of Claims could not consider "loss of access or interference therewith or loss of view as compensable elements of damage".

Thereafter on May 19, 1961 the Court of Appeals rendered a significant decision in the case of *Selig v. State.* There the Court held that section 99 of the Second Class Cities Law imposed liability upon the State for change of grade. The Court there held that where the claimant was left with an adequate service road at grade there was not "change of grade" within the meaning of the Second Class Cities Law. The Court also held that there can be no recovery for interference with easements of light and air in a public street where the obstruction of such easements was not caused by the erection of an elevated railroad by or for a private corporation.

Neither the *National Biscuit* nor *Selig* cases are controlling in the case at bar. In both of said cases, the claimant was furnished with a service road at grade. The service road was 32 feet wide in the *National Biscuit* case and 27 feet wide in the *Selig* case. In the instant case, the former Oswego Boulevard was replaced by Ramp "C" which at some points along claimant's frontage is only 14 feet wide and is as much as eight feet below the level of the former Oswego Boulevard.

*Affidavit in Support of Motion sworn to June 7, 1961.*

(P. 61)

While the rulings in *National Biscuit* and *Selig* do not deny the claimant compensation for damages which are "the direct result of a change in grade" they do raise questions about claimant's right to recover certain elements of damage considered by claimant's real estate experts in the case at bar.

On the trial herein, claimant's experts, Richard N. Groves and Robert J. Clark, testified that in their opinion the value of claimant's property before the change of grade was $196,000 and after was $48,600. They testified that they considered many aspects of damage in order to arrive at the total damage figure of $147,400 However, they did not attempt to allocate the amount of money attributable to each element.

Both witnesses indicated that the primary source of damage was that caused by the change of grade of Oswego Boulevard. This type of damage is clearly compensable under *Selig v. State,* supra. However, claimant's witnesses testified that they also considered such items as loss of advertising value, loss of view and interference with light and air. These elements of damage would not seem to be compensable under the *Selig* and *National Biscuit* decisions.

If the record in this case is permitted to stand without the addition of further testimony, the Court of Claims may have difficulty in determining what portion of the damages testified to by claimant's experts was allocated to items that are legally compensable and what portion was attributed to legally non-compensable factors. Deponent has talked to claimant's appraisers and they have advised

mitted that testimony of this kind will aid the Court of Claims and at the same time, will make a more complete record in the event the Court's decision is later reviewed on appeal.

WHEREFORE, deponent prays that the within motion be granted and the case be reopened to permit the introduction of further proof on the subject of damages.

GEORGE R. FEARON

(Sworn to June 7, 1961.)

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(P. 71)

CASE.

* * * * *

(P. 141)

ROBERT F. BALDWIN, called as a witness in behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination by Mr. Fearon:

* * * * *

(P. 142)

Q. In the meantime, what, if anything, was done with the property? A. The property was completely remodeled and rebuilt from one end to the other, sir, renovated.

Q. Let's start out and tell me—first describe the building, what was its exterior construction before you did anything, now? A. The original construction was similar to as it now exists with the exception of the first floor and the basement area. The approximately 103 feet facing Oswego Boulevard, at the time of purchase, it is my recollection that it had five separate entrances. This was remodeled, and in the course of remodeling it was necessary to reinforce at the basement level as well as the first floor into a single entrance.

(P. 143)

* * * * *

* * * A. At the time of the original purchase by Baldwin Hall Company of the building, it had been used in previous times as a storage warehouse * * *

* * * * * *

(P. 146)

Q. All right. Now, will you tell the Court the kind of things that you did sell? A. Our business is primarily electrical and industrial supplies, both retail and wholesale; and in addition to some appliances.

* * * * *

Q. Will you tell me what you sold there? A. I sold quite a variety of merchandise, everything electrical, lamp bulbs to various electrical fittings, in addition to such mill supplies as drills, abrasives, and also small appliances, electrical appliances such as flat irons, toasters, percolators.

* * * * *

Q. All right. Now, in this over the counter business, the retail business, did you tell me whether or not you

(P. 147)

supplied small contractors who came there to the office? A. That is right, sir.

Q. And generally, what would these electrical contractors be after when they did come during the day, as a rule? A. It has been the habit of the small electrical contractor to pick up himself all the necessary equipment for the installation on any job he is on, and he would usually come first thing in the morning, approximately 7:30 to 8 o'clock, and purchase such materials as were neecssary for installation that day. Oftentimes, he was back to the store three or four times a day, depending on the number of jobs or

whether he needed any additional equipment. There were other contractors also coming to our store, the larger contractors. They would send men there, electricians or foremen from the job, into our store to pick up emergency supplies, something that they had overlooked, or small items that were necessary for installation during the day.

* * * * *

(P. 152)

Q. Now, you have told me about your retail sales. How was your wholesale business conducted at this place? A. In the rear part of the first floor orders were filled or gotten ready for shipment. These orders were obtained by the company either by being sent in by our salesmen, phoned in by various customers, or mailed directly by our customers to us. And the various items that were called for were assembled, packed, and made ready for shipment

(P. 153)

and shipped from the rear of our building across our loading dock onto our own trucks or common carriers.

Q. All right. How many trucks did you have? A. Two.

Q. And where did you make deliveries to? A. We made deliveries in all directions from our store.

Q. Were you limited by the City of Syracuse? A. The City of Syracuse?

Q. Did you deliver to Mattydale, Liverpool, or adjacent areas? A. That is right, sir.

Q. And were some of your customers located in the northern part of the city and around Electronics Park, in Electronics Park, Industrial Park? A. That is correct, sir.

* * * * *

(P. 176)

Q. Have you recalled any further improvements that you actually made, Baldwin Hall actually made in this building at or about the time that you purchased it in '46 that you did not tell us about when I asked you on your direct examination? A. Yes, sir. I didn't go into the details of the actual improvements that were made to the building and should have added to my statement that acoustical ceilings were added to the first and second floor, walls were plastered.

* * * * *

(P. 177)

A. (Continuing) Acoustical tile was added to the first and second floor; walls were plastered where formerly they were exposed brick; under floors repaired, and, in addition, asphalt tile applied to them; necessary repair of windows; necessary trim for a finished operating office and store area.

Q. All right. Now, how many rooms did you put the acoustic tile in or what floor did you put it in on, whichever it is? A. The office area on the first floor, which is designated as our sales office.

Q. That is the space on the right-hand side as you went in? A. The right-hand side as you enter the main entrance; and on the second floor, the entire general office as well as conference rooms and the private offices.

Q. Now, on what floors did you do the plastering where the brick was exposed? A. Both the first and second floor in the same designated areas, the sales office and the general office.

* * * * *

*Robert F. Baldwin for Claimant, Re-direct.*
*Milan J. Lyon for Claimant, Direct.*

(P. 237)

Re-direct Examination by Mr. Fearon:

* * * * *

(P. 242)

Q. Did you list this property for sale with any real estate broker—and with whom—and when did you do it? A. Yes. In early April, 1959 we listed this building with Eagan, Pomeroy, Potter, Groves and Clark Real Estate.

Q. Are they representative, large brokers in the City of Syracuse? Real estate brokers? A. Yes, sir.

* * * * *

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(287)

MILAN J. LYON, called as a witness on behalf of the Claimant, being duly sworn, testified as follows:

Direct Examination by Mr. Fearon:

* * * * *

(P. 296)

Q. Did you do any work on the second floor—any other work on the second floor? A. Yes. Some partitions to separate some of the office areas and toilet rooms; storage rooms; display room; conference room and I think four private offices.

The electrical wiring that was in there was very meager. It had to have an adequate wiring system put in.

Q. What portions of the building did you wire? A. We wired most extensively the basement, first, second and third floors. Some on the fourth and fifth but to a greater extent on the first three and the basement.

Q. What else did you do to the exterior of the building? A. We also had to repair the dock and extend it a little

farther west on the Belden Avenue side. We pointed up a number of the windows.

Q. How many openings were in the front of that building when you took it over—facing onto— A. I don't remember the exact number. I think it was six or eight separate openings on the front.

Q. What did you do about it? A. Closed them up. Let me change that—took them all out and replaced with plate glass windows across the front as shown by your photographs.

Q. Anything else you recall that you did to the exterior of the building? A. I think you'd call the roof "exterior". We replaced the complete roof and reflashed it.

Q. Yes, I would. That is what I was suggesting. What did these improvements cost Baldwin Hall? A. Well, the original extensive remodeling cost, which lasted the first year or so after we purchased it, cost $44,732.79.

(P. 297)

* * * * *

Q. Now, a year or two after that, did you make another improvement? A. Yes. We had to make one other, additional, major improvement which was a new elevator.

Q. What did you put in? A. We put in an Otis freight elevator from the basement to the fifth floor with a penthouse for the controls on the roof.

Q. What did that cost? A. $12,059.90.

* * * * *

(P. 298)

Mr. Fearon: I think we can agree—I offer to stipulate that the highest and best use for which the Baldwin Hall building was adapted on both the date the contract for the improvement of the arterial highway was awarded and the contract signed and

also on the date March 18, 1957, when work actually commenced, was for retail and wholesale purposes.

Is that agreeable?

Mr. Scott: I will enter into that stipulation that that is the highest and best use.

* * * * * *

(P. 299)

Q. Will you tell the Court what the front part of the building was used for. A. The front part of the building was used to transact the so-called "pick-up" business for customers including contractors, etc. where they would come in to pick up small orders, emergency materials that they wanted for use at that time and a good portion of it was in the category of retail business.

Q. At that time the customers could drive right up and step right out onto the sidewalk on Oswego Boulevard as shown in Exhibit # 28? A. Yes, they did.

Q. Did they? A. They did.

Q. Can you describe the character of that business? Who were you dealing with? A. Well, you are dealing with contractors; you are dealing with commercial organizations—well, let's say, electrical contractors, machine shops, job shops, manufacturers, institutions such as hospitals, schools, etc. where they want to pick up merchandise and get it quickly.

Q. What do you say as to the method of delivery in that business that came that way? Did they take it away with them or did you deliver it? A. Most of the trade that came in our front door into our so-called "store" for business came in, gave the order to the countermen and picked it up and took it with them.

Q. What was the Belden Avenue side of the building? A. The Belden Avenue side was where the loading dock

is and the use of that was principally for receiving and delivering and most of the business of a wholesale nature was transacted over in that area.

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(P. 337)

RICHARD N. GROVES, called as a witness on behalf of the Claimant, being duly sworn, testified as follows:

Direct Examination by Mr. Fearon:

* * * * *

(P. 353)

Q. What in your opinion was the fair market value of the building prior to the 18th day of March, 1957 when (P. 354)

construction began? A. I would consider the depreciated value to be $149,370.00.

Q. Now, did you form an opinion as to the value of the land owned by Baldwin Hall on which this building was situated at this time? A. I did.

Q. What in your opinion was the fair market value of the land immediately prior to the 18th day of March, 1957? A. $46,680.00.

Q. Making a total for land and building prior to March 18, 1957— A. $196,050.00 which I rounded out to $196,000.00.

Mr. Scott: What was the last figure?

The Witness: $46,680.00.

By Mr. Fearon:

Q. Now, did you check that figure in any way? A. Yes, I did.

Q. How did you check it? A. I used the economic

method. I ascribed 5925 square feet per floor for the five floors which gave a total of 29,625 square feet at 75¢ or $22,220.00.

Q. Is that rental value? A. Estimated rental income —and I took 5% vacancy and loss or $1,111 making a gross effective rent of $21,109.00.

Mr. Scott: What was that figure?

The Witness: $21,109.00.

A. (Continuing) I took taxes $2713 for 1957; insurance $1086; repairs $994; management $527 and I depreciated the building at $2266 or a total expense item of $7586.

Mr. Scott: Let me have the building depreciation.

The Witness: $2266.

(P. 355)

Mr. Scott: What was the total?

The Witness: $7586.

A. (Continuing) Leaving a net to be capitalized of $13,523, which I capitalized at 6 2/3% return on investment, indicating a value of $203,048.

I capitalized the rate of return based on the band of investment theory of 5% for two-thirds portion and 10% for one-third.

By Mr. Fearon:

Q. Did you arrive at an opinion of the value of that building on or about the 22nd day of September, 1959? A. I did.

Q. When the job was finished? A. I did.

Q. Will you tell us the basis for your—

The Court: What was the date?

Mr. Fearon: 22nd of September, 1959. That is the date the barricades were removed and it was opened up.

A. I valued the property basically on the same reproduction figure of $271,590 and I observed depreciation and obsolescence of $230,850, giving a depreciated building value of $40,740. I valued the land after the improvement of $7850.00, leaving a fair and reasonable value to both land and building of $48,590.00.

Mr. Scott: The land value?

The Witness: $7850.

By Mr. Fearon:

A. Making a fair and reasonable value of land and building what figure? A. $48,600.00.

* * * * * *

(P. 388)

RE-DIRECT EXAMINATION by Mr. Fearon:

* * * * *

(P. 390)

Q. Now, tell the Court whether or not in your opinion there was any increase in the value of real estate in Syracuse, particularly the area in which Baldwin Hall was located between 1947 when it was purchased—the property

(P. 391)

was purchased by Baldwin Hall and 1957 when the construction first commenced for the arterial project. A. You meant 1946, didn't you?

Q. 1946 and 1947. A. The differential between '46 and 1957 was very great. There was a very great increase in real estate values—not only in this area but every other area of Onondaga County.

Mr. Scott: I move to strike—

Mr. Fearon: What?

Mr. Scott: I move to strike the words "very great" increase.

The Court: "Very great" goes out.

By Mr. Fearon:

Q. Can you give the percentage? A. It is pretty hard to give a percentage. Some properties may have increased in value as much as 150% and some may not have increased over 50% to 75%. I think it would have to do with the individual parcel. I wouldn't want to give an over-all percentage. I don't think that is possible.

Q. Could you tell me what in your opinion the property increased from a purchase price of $46,000 to its value plus the additions or improvements of $56,000.00? A. I think I gave you that figure when I gave the figure of $200,000.00. I think it increased from 1946 to 1957 from $45,000.00 with the improvements I know have been made in the building to $200,000.00 in 1957.

* * * * *

(P. 398)

ROBERT J. CLARK, called as a witness on behalf of the Claimant, being duly sworn, testified as follows:

Direct Examination by Mr. Fearon:

* * * * *

(P. 406)

Q. Did you form an opinion as to the fair market value based upon what a willing seller not under compulsion to sell would sell for and what a willing buyer not under compulsion to buy would pay for it after the construction was substantially completed? A. I did.

* * * * *

Q. Now, will you tell me what opinion of value you arrived at for the building after the construction using the formula that I have suggested—that is, the willing buyer and willing seller that I mentioned in my preceding question? A. In my summation method my after valuation was $48,600.00.

* * * * *

(P. 413)

I considered the building is isolated on a high retaining wall after construction; that it is more difficult for purchasers to reach the building after construction; that the building no longer is available and adaptable for commercial use; that the building after construction—the highest and best use is warehousing.

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(P. 466)

CHARLES RILEY, called as a witness in behalf of the State, having been first duly sworn, testified as follows:

Direct Examination by Mr. Scott:

* * * * *

(P. 467)

Q. And you did arrive at a reproduction value, is that correct? A. I did

Q. Will you state the figure that you arrived at? A. The basic structure, reproduction cost would be $195,523.20. The improvements which were made within the last 10 years amounted to approximately $60,000.00.

Q. All right, Now, did you arrive at a total sound value of this property as of the year 1957? A. I did.

Q. What is that figure? A. Well, the best information I have is the building was built around 1900, which would make it a little better than 50 years old at the time in question. I allowed the building a 100 year life, or about a one per cent per year depreciation. I therefore took a 50 per cent depreciation from the $195,523.20, which left a sound value of $97,761.60 on the basic structure.

The Court: $97,700-what?

A. $97,761.60.

I used the same method on the $60,000.00 of improvements, which were only 10 years old. In other words, I took one percent a year, or 10 percent depreciation on the

*George D. Clothier for the State, Cross.*
*Richard N. Groves recalled for Claimant, Direct.*

(P. 468)

$60,000.00, which left a $54,000.00 sound value to the improvements. Or, by adding the two figures together, I get a total sound value of $151,761.60 or, in round figures, say $150,000.00.

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(P. 514)

GEORGE D. CLOTHIER, a witness for the State, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination by Mr. Fearon:

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(P. 520)

Q. * * * What was your before value for the land in 1957? A. $21,600.00.

* * * * *

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(P. 559)

RICHARD N. GROVES, re-called as a witness on behalf of the Claimant, having been previously sworn, testified as follows:

Direct Examination by Mr. Fearon:

* * * * *

(P. 561)

Q. When did you make the re-appraisal? A. I would say we started conferences shortly after the decision was made and we have had several conferences and worked out the re-appraisal during that period of time. It is probably almost a year.

Q. You said "since the decision". You mean the decision in the Selig case? A. Yes.

Q. Now, what is your opinion of the fair market value of the building prior to the construction? A. $149,370.00.

*Richard N. Groves recalled for Claimant, Direct.*

Q. And the value of the land prior to the construction and the appropriation? A. $46,680.00.

Q. Have you changed your opinion as to the fair market value of the property before and after the reconstruction of the new Oswego Boulevard? A. No, I have not.

Q. Will you assume, that as a result of the legal effect of the decisions which I have mentioned, you are obliged to eliminate from your consideration, in arriving at the figure that represents the loss or reduction of the fair market value of the property, the following factors: diversion of the flow of traffic, circuity of access, loss of view from Salina Street or Oswego Boulevard, difficulty in driving tractor trailers to and from the property, the narrowing of West Belden Avenue, the construction of the new bridge over Oswego Boulevard and North Salina Street; interference with light and air; the fact that (P. 562)

Belden Avenue no longer crosses North Salina Street; loss of direct access to Salina Street by reason of the wall on the westerly side of North Salina Street and loss of the team track on the north side of West Belden Avenue —assuming that you can consider as legal damages only those directly resulting from the change in grade of Oswego Boulevard and assuming that you are obliged to exclude the items which I have just read and any other items which are not the direct result of the change of grade of Oswego Boulevard, are you able to state whether your after figure—that is, after the appropriation figure —would be changed? A. Yes, it would.

* * * * *

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(P. 613)

JUDGMENT OF REVERSAL.

* * * * *

(P. 614)

"* * *

This Court hereby makes the following new conclusions of law:

1. The diminution in value of claimant's property is considered as *damnum absque injuria.*

(P. 615)

2. The judgment, insofar as it awards damages, should be reversed and the claim dismissed; and

It is hereby further ORDERED, That the judgment so appealed from, insofar as it awards damages to claimant be, and the same hereby is unanimously reversed on the law and the facts, and the claim is hereby dismissed, and otherwise the judgment is hereby affirmed, without costs of these appeals to either party.

Memorandum, which is hereby make a part hereof."

* * * * *

ORDERED AND ADJUDGED that the judgment of the Court of Claims entered in the Clerk's Office thereof on July 12, 1963, insofar as it awards damages to claimant be, and the same hereby is unanimously reversed on the law and facts, and the claim is hereby dismissed, and otherwise the judgment is hereby affirmed, without costs of these appeals to either party, memorandum, which is hereby made a part hereof.

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(2427)

IN THE

# Supreme Court of the United States

October Term, 1965

No. ~~1027~~ 147

BALDWIN-HALL, INC.,

*Petitioner,*

*v.*

THE STATE OF NEW YORK,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

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IN THE

# Supreme Court of the United States

October Term, 1965
No. 1327

BALDWIN-HALL, INC.,
*Petitioner,*

*v.*

THE STATE OF NEW YORK,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

(1)

**The determination of the amount of compensation does not present a constitutional question subject to review by this Court.**

Basically, the questions presented in the petition for certiorari herein relate to an interpretation by New York State Courts of a State statute (Second Class Cities Law, §99) and the relation of a particular factual situation thereto. The most that petitioner alleges is a *mistake* of law or fact in the application of that statute. The question of whether an injury is *damnum absque injuria* or the amount of damages to be paid to an owner by reason of

an act of eminent domain is not a constitutional question (*Chicago, B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226, 246 [1897]; *McCoy* v. *Union Elevated R. R. Co.,* 247 U. S. 354, 363 [1918]). "When property is taken by eminent domain * * * there must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally" HOLMES, J., in *McGovern* v. *City of New York,* 229 U. S. 363, 370-371 [1913]). In the instant case, no property of the petitioner was actually taken, a factor which increases the appropriateness of the principle above quoted.

This Court has held that as long as compensation is made or provided for, the determination of the amount of the compensation does not present a substantial Federal question under the due process provision of the Fourteenth Amendment (*Appleby* v. *Buffalo,* 221 U. S. 524, 531-3 [1911] affg. 189 N. Y. 163, 81 N. E. 954 [1907]). In the cited case, the New York Court of Appeals had held in a condemnation proceeding that the condemnee was entitled only to nominal damages.

In *Provo Bench Canal Co.* v. *Tanner,* 239 U. S. 323 (1915), affg. 40 Utah 105, 121 Pac. 584 (1911), this Court held that in eminent domain proceedings an award of one dollar for property taken for an easement did not deprive the owner of his property without due process of law if the State court recognized the right to recover for any substantial damages, but found as a matter of fact that no damage whatever had been shown. In the instant case, all the State Courts recognized that petitioner had a right to recover any damages sustained *directly as a result of a change of grade,* but the Appellate Courts found that the injury sustained, if any, was due to circuity of access, for

which there is no recovery provided by law (Pet'r's Appendix, p. 5a). That injuries may constitutionally not be compensable as a matter of law was decided by this Court in *Sauer* v. *City of New York*, 206 U. S. 536, 547-8 (1907), affg. 180 N. Y. 27, 30-31, 72 N. E. 579 (1904).

In *Northern Lights Shopping Center* v. *State of New York* (15 N. Y. 2d 688, 204 N. E. 2d 134 [1965]), the New York Courts held that damage to claimant's property caused by limitation of access resulting from a combination of the power of eminent domain and the police power was *damnum absque injuria*. Certiorari was denied by this Court on a petition raising questions similar to those presented by the petition herein (382 U. S. 826 [1965]).

(2)

**Decisions below were to the effect that damages were result of circuity of access, not change of grade, and thus, not compensable.**

Without going into factual issues, at this point, it should be noted that respondent does disagree with some factual statements and conclusions reached therefrom, as they are stated in the petition herein.

The building involved in this case was originally constructed as a warehouse around the year 1900 and had been continuously used for such purposes, by various owners, until claimant's purchase in 1946. The building was purchased for $45,000 in that year and remodeled in subsequent years for more effective adaptation to claimant's business, a wholesale distributorship in electrical fixtures and appliances.

Claimant constructed offices and a salesroom on the first floor and offices on the second floor. About half of the first

floor was devoted to shipping of merchandise and the remaining third, fourth and fifth floors and the basement to storage. The evidence showed that large orders and heavy merchandise were shipped or loaded from a dock on West Belden Avenue and that all merchandise was received on that side of the building. Additionally, customers wanting small orders could get over-the-counter service in the salesroom which had its entrance from Oswego Boulevard, upon which the building fronted. Claimant alleged that these customers were mostly small contractors or contractors who needed a few items in a hurry. While claimant further alleged that these over-the-counter sales were retail, its expert, Groves, revealed the true nature of the business when he correctly referred to this as wholesaling (R. 569).

Although claimant's property fronts on Oswego Boulevard, the peculiar nature of the intersection of the Boulevard and North Salina Street deprived claimant initially of the full advantage of that location. Because of the triangular nature of the intersection, only the southbound lane of Oswego Boulevard passed claimant's property; the northbound lane crossed North Salina Street at the intersection with West Belden Avenue and became a two-way street for the remainder of its length. Claimant's property was separated from North Salina Street by the one lane of Oswego Boulevard and a triangular shrub and grass-covered mall (Pet'r's Ex. 11, p. 6 of Petition).

In 1957, the State commenced construction of the Oswego Boulevard Arterial in the City of Syracuse. In the course of that construction, North Salina Street was depressed and Oswego Boulevard elevated to pass over North Salina. In front of the claimant's building, a southbound ramp was constructed, providing access from West Belden to North Salina.

As a result of the total work, claimant's building concededly no longer fronted at grade on Oswego Boulevard, but rather fronted, substantially above grade, on the access ramp. Also as a consequence of the construction, a railroad team track was removed from the north side of West Belden Avenue, which siding had formerly been available for use by claimant in receiving merchandise. Prior to the construction, some limited parking had been permitted in front of claimant's building; however, the inherent nature of the new road system, separate and apart from the change of grade, eliminated that parking. Thereafter, however, additional parking on the north side of West Belden Avenue became available through the removal of pre-existing buildings and the construction of a municipal parking lot.

The new road system and its resulting traffic pattern also made access to the property more circuitous, but not impossible, or, in fact, unsuitable.

The claim alleged five causes of action for damages from change of grade, *de facto* appropriation of light, air, and access to North Salina Street and Oswego Boulevard, trespass, and negligence in the construction of the highway project (R. 51-56). The preponderance of testimony on behalf of claimant, related, however, to the access to and from the property which remained after the construction.

In testifying to damages of $147,460 (R. 356), claimant's expert, Groves, listed the factors he took into consideration in arriving at his estimate of damages (R. 357-358, 360). It is significant that in two and one-half pages of listing factors involved in the damages, he mentions the street grade or change of grade only three times. However, on the reopening of the trial subsequent to the decision of the New York Court of Appeals in the *Selig* case

(*Selig* v. *State*, 10 N. Y. 2d 34, 176 N. E. 2d 59 [1961]), Groves reversed his emphasis and revised his damage figure to $131,050, or a reduction of only $17,410 (R. 562, 565). The damages which he formerly attributed to circuity and difficulty of access he now attributed to change of grade; the damages from loss of advertising value (view *of* the property) he now attributed to change of grade; the other difficulties inherent in the changed traffic pattern now were due to the magic phrase, "change of grade".

Assuming that the actual economic damage to the property, to which he had testified, constituted legal damages, the State's expert testified to total damages of only $16,950 (R. 472-473).

Substantially, therefore, it is apparent that there was before the Courts below a substantial conflict as to the nature of the injury sustained by the petitioner. The decisions by the Appellate Courts reflect the argument advanced by the State that the damages sustained were not attributable to a change of grade, but rather to the establishment of a limited access highway in front of petitioner's property and that the access remaining on West Belden Avenue was suitable and sufficient for the use to which petitioner's property was put. This factor places this case squarely within the rule of the cases previously cited in this brief and raises no issue which should be reviewed by this Court.

**(3)**

**Petitioner's constitutional arguments are without foundation.**

The Petition, herein, also argues that the dismissal of the claim by the Appellate Courts in New York violates the

statutory intent of Second Class Cities Law, §99, and consequently deprives petitioner of property without due process of law and further deprives petitioner of constitutional rights by requiring it to pay more than its just share of the cost of a public improvement. The factual and legal absurdity of these claims can be briefly demonstrated.

**A. The construction of § 99 urged by petitioner does violence to the clear language of that section. Petitioner urges this Court to do that which it claims the Courts below erred in doing.**

Petitioner correctly stated in the Court below that "A statute must be read and given effect as it is written by the Legislature, not as the Court may think it should or would have been written * * *." Second Class Cities Law, § 99, provides for payment of *compensation for damages done as a result of a change of grade.* Not all damage from new highway construction necessarily results from a change of grade, and the sole fact that the grade has been changed does not entitle a claimant to recover damages otherwise noncompensable where they are not a direct result of a change of grade.

In order to recover compensation, petitioner must have proven two things: (1) that it sustained damages directly resulting from a change of grade and (2) the monetary value of those damages. Proof of the monetary value of damages resulting from noncompensable elements will not suffice as such proof. These elements are simply items of factual proof; they do not involve elements of either statutory or constitutional rights. Simply stated, our position is that petitioner did not prove these elements in this case and, therefore, was not entitled to recover.

However, petitioner now asks this Court to amend § 99 to add damages for circuity and inconvenience of access

and damages for loss of easements of light and air to the damages for change of grade provided in the statute by the New York Legislature. To adopt petitioner's contentions here would involve this Court in the very "judicial legislation" condemned by petitioner in the Court below. The section refers to damages from change of grade and those are the damages which must be proven. Not having proved such damages, petitioner is not entitled to recover here.

**B. The rule that certain economic results of public improvements are not compensable does not constitute a denial of any constitutional rights of the petitioner.**

The Petition alleges that the doctrine of *damnum absque injuria* compels petitioner to bear more than its fair share of the cost of the improvement. In support of this argument, it cites tax and statutory assessment cases, none of which is here applicable. The same arguments have long since been disposed of in condemnation cases. Claimants in partial-taking cases, where benefits have been offset against damages, have complained that neighbors from whom no property has been taken have not been equally charged for benefits. But the holdings there have been that no constitutional rights have been violated by setoff of benefits (see, for example, *Newman* v. *Metropolitan Elevated Ry. Co.*, 118 N. Y. 618 [1890]; *Gilmore* v. *State*, 208 Misc. 427, 143 N. Y. S. 2d 873 [1955]).

Equally so, no constitutional rights are violated by rules which hold that certain economic results of public improvements are not compensable. As a matter of logic, damages from circuity of access, if recoverable by an owner of property abutting on the improvement as a matter of constitutional right, would also be recoverable by an owner of property a block or more away whose damages differed only in degree.

Even so, petitioner's basic allegation of damage is that while its appraiser alleged a before value of $131,000, claimant sold the building in 1959 for only $41,000, thus sustaining a *prima facie* loss of $57,000. This argument is fallacious at best. The State's appraiser testified that the value before construction was only $51,000 (R. 472), thus the loss would presumably be only $10,000. However, both of these appraisals were based upon land value plus depreciated reproduction cost of the building, not on a market data basis. It may very well be that the sale price of this building was a true indication of the actual market value of the building even before construction. In this regard, certain basic facts should be considered.

Petitioner purchased this property in 1946, immediately subsequent to the conclusion of World War II, and used it as remodeled for a period of over 12 years. During that time, new developments drastically affected the values of warehouse properties on the periphery of the downtown area. The construction of new highways and the dispersement of both industry and retail business to outlying areas considerably lessened the desirability of central city warehouse locations. The significance of this element is amply demonstrated by the fact that on the sale of the Oswego Boulevard Building, petitioner did not buy another warehouse building in the central city area, but rather built a new one-story building in Industrial Park in the suburban Town of Dewitt, where land values approximated only 25¢ a square foot.

The location of petitioner's new building has further significance, in view of the frustrated efforts on trial to prove the true nature of the sale of claimant's building (R. 191-214). Petitioner sold its building to Middle Oak, Inc., a subsidiary corporation of the Pomeroy real estate organization (R. 191-195), for an asserted consideration

of $41,000. However, in conjunction with that sale, the building was leased back to Baldwin-Hall, and also presumably tied in with this sale was petitioner's purchase of land in Industrial Park from Donald Pomeroy. Thus, even petitioner's assertion of economic damage as reflected in its sale price is suspect.

The vacancies in other central city warehousing properties not affected by highway grade changes, the dispersion of industry and commerce from central city areas, and the sheer age of the building itself reflect the basic reasons for its continued vacancy.

Thus, both as a matter of law and fact, petitioner has been deprived of no rights compensable under either the Constitution or Second Class Cities Law, § 99, and no issues are raised which should be reviewed by this Court.

## CONCLUSION

**The petition for a writ of certiorari should be denied.**

Dated: June 2, 1966.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1965

No. [redacted] 147

BALDWIN-HALL, INC.,

*Petitioner,*

v.

THE STATE OF NEW YORK,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

## REPLY BRIEF

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IN THE

# Supreme Court of the United States

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No. 1327

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BALDWIN-HALL, INC.,

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THE STATE OF NEW YORK,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

## REPLY BRIEF

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### (1) It cannot be disputed that Petitioner suffered substantial economic loss by reason of the highway reconstruction.

For the first time in the history of this litigation the State contends that petitioner suffered no economic loss as a consequence of the highway reconstruction. This argument is advanced despite the unreversed findings of the Court of Claims that the value of the property prior to

reconstruction was $122,000 and the value after was $65,000 (R. p. 11, App. p. 16a). And to support this argument, the brief in opposition to the petition states what purport to be "basic facts" which are not followed by references to the record and which are not contained in the record.

Petitioner disclaims the truth of the statements at pages 9 and 10 of respondent's brief that petitioner's central location was less desirable for its retail and wholesale business than outlying areas, or that it paid $.25 a square foot for land to relocate, or that it purchased the land from Donald Pomeroy, or that its relocation in the Town of Dewitt was a matter of choice rather than due to the fact that no central space was available. Moreover, petitioner protests the allegation that it acted in other than good faith and according to its best business judgment in the efforts made to relocate its business.

**(2) The denial of any and all compensation presents a constitutional question.**

Although no compensation was allowed to petitioner, respondent seems to be arguing at pages 1 and 2 of its brief that there is no constitutional question because the only issue is the amount of compensation to which petitioner is entitled. Without belaboring the obvious, petitioner wishes to point out that the cases cited do not support the argument. Instead, they illustrate that this Court will listen to at least one of the constitutional questions raised in the petition — whether the State has applied a rule of law in absolute disregard of petitioner's right to compensation or a rule of law which makes it impossible for it to obtain just compensation.

In addition, although respondent cites *Sauer* v. *City of New York*, 206 U. S. 536 (1907), affg. 180 N. Y. 27, 72 N. E. 579 (1904) which held that loss of access and diminution in

market value of an abutting owner's property caused by construction of an elevated viaduct along the street was *damnum absque injuria* in the absence of a statute permitting compensation (180 N. Y. at 30; 72 N. E. at 579), respondent fails to cite the subsequent case, *People ex rel Crane* v. *Ormond*, 221 N. Y. 283, 116 N. E. 993 (1917), involving the same claim made later, under a change of grade statute, in which the only question was whether the viaduct constituted a change of grade.

## CONCLUSION

**For the reasons set forth above and in the Petition For a Writ of Certiorari, it is respectfully submitted that Certiorari should be granted.**

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